

FCC MAIL SECTION

Federal Communications Commission

DA 99-2246

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Before the
Federal Communications Commission
Washington, D.C. 20554

DISPATCHED BY

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Pleasant Dale, Nebraska)

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MM Docket No. 99-156
RM-9613

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 13, 1999

Released: October 22, 1999

By the Chief, Allocations Branch:

1. At the request of Mountain West Broadcasting ("Mountain West" or "petitioner"), the Commission has before it the Notice of Proposed Rule Making, 14 FCC Rcd 7388 (1999), proposing the allotment of Channel 256A to Pleasant Dale, Nebraska, as its first local aural service. Petitioner filed comments supporting the allotment. Reply comments were filed by Mitchell Broadcasting Co. of Iowa ("Mitchell").

2. The Notice requested that the petitioner provide specific information to demonstrate that Pleasant Dale has the social, economic and governmental indicia to qualify it as a community for allotment purposes. As stated in the Notice:

[W]e may find that a population grouping of 253 people does not constitute a community for allotment purposes where the community may be devoid of the customary factors associated with determining community status, such as a library, schools, shopping centers, churches, a newspaper and social and civic organizations. . . In past cases, we have rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question.

In response, petitioner reiterates that Pleasant Dale is incorporated with a population of 253 people. It adds that Pleasant Dale has a mayor and town council, its own post office and zip code, and several retail businesses including a general store.

3. Mitchell is the licensee of Stations KOIL(AM), Bellevue, Nebraska, KQKQ(FM), Council Bluffs, Nebraska, KZFX(FM), Lincoln, Nebraska, and KKAR(AM), Omaha, Nebraska, and states that it would compete directly with a Pleasant Dale station. Mitchell argues that the Commission cannot allot the requested channel without first requiring that the petitioner submit financial information demonstrating its ability to submit an application for a construction permit and participate in the auction for the channel. It states that during the eight months preceding the close of the record in this proceeding, the Commission has issued Notices of Proposed Rule Making to allot approximately 124 new FM allotments based on rule making petitions submitted by Mountain West or other corporate

entities where Victor Michael, Jr. is the principal. According to Mitchell, the petitioner, in all but fifteen of these proceedings, has filed comments reiterating its intention to apply for the channel, if allotted. Based upon a minimum upfront payment of \$16,000, Mitchell states that petitioner would need \$1,984,000, in order to participate in the upcoming auctions of broadcast frequencies.¹ However, it contends that Mountain West is "woefully incapable" of constructing all of the stations for which it has proposed channel allotments. Mitchell arrives at this conclusion based on what it states is petitioner's "substantial underestimation" of the costs to construct and operate a new FM station.² Therefore, it argues that the Commission should not allot the requested channel without first finding that the petitioner is financially qualified. Mitchell states that resolution of petitioner's financial wherewithal at the allotment stage is especially important now that the Commission no longer conducts comparative hearings where such issues have been resolved in the past. Now that channels are awarded through auctions, the Commission does not conduct an examination of an applicant's financial certification until after the auction is concluded.

4. In addition, each of these petitions, according to Mitchell, contain only sparse information concerning the community or their need for an allotment, being limited to the channel requested, a spacing study, the population of the community, and a general statement that the allotment would serve the public interest since it would provide a local outlet for self expression or for warning the area of emergency weather or health hazard conditions. Mountain West also states that it will file an application for a construction permit and, if selected, construct the proposed facility. Mitchell submits that the information provided concerning the community is insufficient to find that the allotment would serve the public interest, convenience or necessity, or that it would result in the fair, efficient and equitable distribution of service as required by Section 307(b) of the Communications Act.

5. We do not believe that the public interest would be served by requiring the petitioner to demonstrate its financial ability to construct and operate a station at the rule making stage. It is true that the Commission no longer holds comparative hearings on mutually exclusive applications where financial issues could be raised but rather conducts auctions for newly allotted channels. However, Mitchell has not provided any information showing that Mountain West or any corporate entity of which Victor Michael is a principal is financially unable to participate in the auction for the channel, if allotted, and to construct and operate, if granted the construction permit. In this connection, we note that Michael submitted settlement agreements to the Commission prior to the September 28, 1999, closed auction with respect to the Victor, Idaho, Newcastle, Wyoming, Hope, North Dakota, and Glenrock, Wyoming (BPH-971010MG) applications and that he qualified and participated in the

¹ Stating that the average upfront payment in the September 28, 1999, Closed Broadcast Auction No. 25 was \$32,312.50, Mitchell submits that petitioner actually needs \$4,006,874 to actively pursue each application as he has certified he will do.

² Mitchell states that Michael has pending before the Commission four construction permit applications for new FM station in which he estimates that he can construct and operate each station for three months without revenue for \$50,000. See, Newcastle, Wyoming (BPH-971107MI), Victor, Idaho (BPH-970815MF and BPH-970814ML), Franklin, Idaho (BPH-970814MM), and Hope, North Dakota (BPH-970925NC). Mitchell contends that the average cost of construction and three months operation is actually \$200,000.

auctions for FM channels at Driggs and Franklin, Idaho. Further, since the allotment of a new FM channel will be the subject of a filing window in which other interested parties may participate, there is no guarantee that Mountain West will be the ultimate permittee. Finally, any party, including Mountain West, who states during the rule making proceeding an intention to file for and operate a station if granted the permit is subject to the sanctions set forth in 73.1105 of the Commission's Rules as well as Sections 502 and 503 of the Communications Act.³ Therefore, should a pattern develop which leads to a concern that the Commission's processes are being abused, appropriate action could be taken at that time.

6. Based on the evidence submitted by the petitioner, we believe that it has failed to establish that Pleasant Dale qualifies as a community for allotment purposes and therefore would not serve the public interest to allot the requested channel. In response to the Notice, petitioner merely states that Pleasant Dale has a mayor, town council, post office, zip code, and several retail businesses including a general store. It provides no information as to the businesses which it says exist to demonstrate that they are intended to serve the needs of Pleasant Dale as opposed to other areas. This is a critical deficiency because in past cases, we have rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question. See Gretna, Marianna, Quincy and Tallahassee, Florida, 6 FCC Rcd 633 (1991), and cases cited therein. We have determined that Pleasant Dale is incorporated, with a population of 253 people. However, while petitioner states that Pleasant Dale has a mayor and city council, it provides no information as to what municipal services this local government may provide to the residents, or the names and addresses of the businesses which it states exist. In addition, petitioner has not provided the names or addresses of any social or civic organizations, schools, libraries or other governmental services which are located within Pleasant Dale. While we acknowledge that Pleasant Dale does have a post office, the Commission has previously held that the existence of a post office is insufficient, by itself, to demonstrate that a place is a community for allotment purposes. See Broadview, Montana, MM Docket 99-79, released September 3, 1999 (64 FR 51470, September 23, 1999), and cases cited therein, Avon, North Carolina, 14 FCC Rcd 3939 (1999).

7. Accordingly, IT IS ORDERED, That the petition of Mountain West Broadcasting (RM-9613) to allot Channel 256A to Pleasant Dale, Nebraska, IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

³ In Abuses of the Commission's Processes, 5 FCC Rcd 3911, 3914 (1990), recon. denied, 6 FCC Rcd 3380 (1991), the Commission stated: A statement of interest in operating a station made by a party who, in fact, lacks the requisite intent to construct and operate the proposed facility will henceforth be considered a material misrepresentation within the meaning of Section 73.1105 of the rules and would be subject to prosecution pursuant to Section 502 of the [Communications] Act, forfeiture pursuant to Section 503 of the Act or other appropriate administrative sanctions.

FEDERAL COMMUNICATIONS COMMISSION

**John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau**